Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-576

J. GORDON EDWARDS, PH.D., THOMAS H. JUKES, PH.D., ROBERT WHITE-STEVENS, PH.D.,
Petitioners,

v.

NATIONAL AUDUBON SOCIETY, INC., ROBERT S. ARBIB, JR., ELVIS J. STAHR, JR.,
Defendants,

and

THE NEW YORK TIMES COMPANY, ROLAND C. CLEMENT,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Questions Presented for Review.

Question No. 1, posed at page 2 of the petition, is not presented by this record.

The record does not support a finding of reckless disregard for the truth on the part of either the New York Times or Roland C. Clement. Consequently, there is no issue in this respect for submission to this Court.

Question No. 2 is incorrect in asserting the decision of the Court of Appeals affords an unprecedented and near absolute immunity to the press.

The Court of Appeals decision has not afforded an unprecedented or near absolute immunity to anyone.

The decision of the Court of Appeals on this record does not constitute any departure from or extension of the First Amendment protection afforded the press, and is entirely consonant with prior decisions of this Court. Furthermore, the Court below found that "Roland Clement cannot be found liable for a defamatory statement, which, as far as this record reveals, he never made" (petition, 19A).

Question No. 3 incorrectly characterizes the review of the evidence by the Court of Appeals. We submit the weight of evidence is not an appropriate subject for this Court's review.

Question No. 4 is not presented on the record before this Court.

The Court of Appeals set aside the verdicts and dismissed the complaint also because the evidence did not support a finding of actual malice against either respondent, and failed to support a finding that respondent, Clement, uttered a libel.

Accordingly, there is nothing presented which warrants review by this Court.

ARGUMENT.

I.

The Court of Appeals did not eliminate reckless disregard as a basis for a finding of actual malice in public figure libel cases. No such disregard can be found to exist on the record of this case, and review by this Court based upon petitioners' contentions to the contrary is unwarranted. The Court of Appeals did not depart from the legal rationale of *New York Times v. Sullivan,* 376 U. S. 254 (1964), or any of the opinions sired by that decision.

The fact that Devlin was aware of the position of petitioners is not a basis for a finding of actual malice. As this Court has made it clear, mere denials of allegations are insufficient to establish the "high degree of awareness of • • • probable falsity" that is required to find actual malice through reckless disregard for the truth. *Garrison v. Louisiana,* 379 U. S. 64, 74 (1964).

Investigatory failures, without more, likewise fail to qualify as a basis for finding actual malice through reckless disregard of the truth. *Curtis Publishing Co. v. Butts,* 388 U. S. 130, 153-54 (175).

The Times had inquired of both sides in the controversy and knew there were sharply divergent views. Publication at that point without further investigation, particularly where, as here, both sides of the issue are reported, is not reckless disregard.

As stated in *St. Amant v. Thompson,* 390 U. S. 727, 731 (1968):

> "[The] cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

Implicit in the Court of Appeals finding that the Times article "was the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps" (556 F. 2d at 120, appendix to petition at 14A) is the finding that the publication was not made in reckless disregard for the truth. Nothing in its opinion, or the record of this case, constitutes, or makes possible, the radical departure from *Times v. Sullivan*, urged by petitioners in their Point I.

II.

There is nothing novel, special or uniquely important about the constitutional issues presented in this routine libel case. An individual certainly does have a right to protection of his own good name (petition, at 15), and it is equally certain that that right is limited by "the need for a vigorous and uninhibited press • • •." *Gertz v. Welsh*, 418 U. S. 323, 342 (1974). This Court has provided abundant guidance to the lower courts as to the considerations relevant to the reconciliation of these conflicting policies, e. g., *Ocala Star-Banner Co. v. Damson*, 401 U. S. 295, 300-01 (1971); *Time, Inc., v. Pape*, 401 U. S. 279, 290-92 (1971); *St. Amant v. Thompson, supra.*

Absent significant issues of law, not previously adjudicated, undertaking a case-by-case factual balancing between the needs of the press and its readers and an individual's claim to compensation for injurious falsehood,

as by granting the petition herein, would render this Court's duty to supervise the lower courts unmanageable. The standard for recovery by a public figure for injury to reputation has been announced. See *Gertz*, 418 U. S. at 342-43. Each nuance of its application in individual cases is not, we submit, an appropriate matter for review by this Court. The issues presented on this record are narrow and principally of interest to these litigants.

Petitioners would invert the public interest in robust and open debate on controversial issues, and misuse it to stifle the Times reporting of views held by those opposed to theirs. The Times and the public have the right to report and know the position of the parties to a rough and tumble public controversy.

Petitioners have described the Audubon Society as "deliberately genocidal" and guilty of '*de facto* murder." They will not be deterred by the Times article they complain of here, and their First Amendment rights have never been an issue in this case, in any event.

III.

Petitioners attack the exercise by the Court of Appeals of its function in reviewing and evaluating the legal effect of testimony and other evidence adduced at the trial. Such factual assertions should not, we submit, burden this Court.

Furthermore, it is petitioners who have been afield in their examination of the evidence rather than the Court of Appeals.

Thus, they assert that the Court of Appeals did not take note of "Clement's contempt for and hostility towards petitioner throughout the proceedings" (petition at 23).

However, it is beyond doubt that the clear and convincing proof of "actual malice" required by the *Sullivan* test is not satisfied by proof of general ill will or hatred. *Greenbelt Cooperative Publishing Association v. Bresler,* 398 U. S. 6, 10-11 (1970); *Garrison v. Louisiana,* 379 U. S. 64, 73-75 (1964).

The petition additionally asserts that Clement supplied the petitioners' names "to Arbib without a word of caution" (petition at 24). This is directly contradicted by the record.

> "Indeed, Arbib's testimony was completely contradicted, that Clement provided the names of prominent spokesmen on behalf of DDT only on condition that Devlin be told 'we are not calling anyone paid liars'" (petition at 17A-18A).
>
> "he [Clement] believed it would be all right to give the names to Mr. Devlin as long as we qualified this by saying 'We don't have any knowledge of anyone being paid liars, and all we want to say is that they have been consistent misinterpretors of the information in *American Birds*'" (petition at 7A quoting the trial transcript at 549).

A further factual confusion manifested in the petition is demonstrated by the reference (petition at 14) on the question of malice to the opinion below dealing with the absence of evidence of Clement's supplying the petitioners' names knowing they would be portrayed as "paid liars." Petitioners fail to recognize the distinction between the utterance of a libel and the element of actual malice, which may motivate such an utterance. The Court of Appeals found an "absence of any evidence in the record that he [Clement] endorsed or made the single statement that could be found to have been libelous under the Constitution" (petition, p. 3A). This had nothing to do with malice.

None of Mr. Clement's language, except for the softening phrase he added to the *American Birds* Foreword: "or is parroting something he knows little about" after the phrase "paid to lie," was published in the August 14, 1972 New York Times article. In any event, the Foreword, which the District Court found to be non-libelous, did not identify any persons.

A third party cannot be charged with a libel by a publication unless there was either a *verbatim* or substantially accurate repetition of defamatory material he uttered. *Klein v. Biben,* 296 N. Y. 638 (1946); *MacFadden v. Anthony,* 107 N. Y. S. 2d 520 (N. Y. Co. 1952); *Storch v. Gordon,* 23 Misc. 2d 477, 481 (Kings Co. 1960). Clement conveyed petitioners' names to Arbib solely by means of a non-defamatory manuscript, which was placed in evidence, with the admonition "that we are not calling anyone paid liars."

A search of the applicable authorities in New York and elsewhere in the United States, expectably, discloses no decision which upholds a charge of libel against a person who made non-defamatory utterances out of the presence of the press, where those utterances were subsequently called to the attention of the press, and did not appear either in substance or verbatim in the newspaper article held to be libelous. Such is the unprecedented result petitioners seek as to respondent, Clement.

The evidence did not support a finding of either a libel or actual malice against Clement, and the Court of Appeals did not exceed the proper bounds of appellate review of the evidence in so holding.

There was no impropriety by the Court of Appeals below; its decision was consonant in all respects with the

rule of law articulated by this Court, and no special and important reasons for review or a writ of certiorari are presented.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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